UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

ROBERT HICKS, an individual, and on behalf of others similarly situated and aggrieved, Plaintiff, v. UTILIQUEST, LLC, a Georgia Limited Liability Company; DYCOM INDUSTRIES, INC., a Florida corporation; and DOES 1 through 50, inclusive, Defendants.	No. 2:24-cv-00911-DJC-AC ORDER GRANTING MOTION TO COMPEL ARBITRATION

Plaintiff Robert Hicks brings a putative class action complaint against Utiliquest, LLC and Dycom Industries, Inc., along with 50 Doe Defendants (together, "Defendants"), for various violations of California's Labor Code, including meal and rest break claims and overtime and reimbursement claims. In addition, Plaintiff brings a representative action under California's Private Attorneys General Act ("PAGA"), codified at California Labor Code section 2698, *et seq*. Defendants move to enforce the arbitration clause and the class or collective action waiver contained in an

agreement Plaintiff signed as a condition of employment with Defendants. Plaintiff opposes, arguing that Dycom cannot enforce the agreement as a non-signatory and that, in any event, the agreement is unenforceable because it is unconscionable. For the reasons set forth below, the Court GRANTS Defendants' Motion to Compel Arbitration (ECF No. 9).

BACKGROUND

I. Factual Background

Plaintiff is a California citizen and resident who worked for Defendants as a non-exempt employee from July 2022 until on or around September 2023. (*See* Class Action Compl. (ECF No. 1 at 51–68) ¶ 4 ("Complaint" or "Compl.").) Plaintiff alleges that Defendants "were the joint employers of" Plaintiff. (*Id.* ¶ 9.) Plaintiff alleges that both Utiliquest and Dycom maintain offices and facilities in California and conduct business in the state, even though Utiliquest is a Georgia limited liability company and Dycom is a California limited liability company. (*See id.* ¶¶ 6–7.)

II. Procedural Background

Plaintiff filed the Complaint in Sacramento County Superior Court on January 24, 2024. (*See* Compl. at 18.) Defendants removed the matter to federal court based on jurisdiction under the Class Action Fairness Act, codified at 28 U.S.C. § 1332(d), on March 22, 2024. (*See* ECF No. 1.) Defendants filed the instant Motion on March 29, 2024. (*See* Defs.' Mem. of P. and A. in Supp. of Mot. to Compel Arbitration (ECF No. 9-1) ("Motion" or "Mot.").) Plaintiff filed his Opposition on April 12, 2024. (*See* Pl.'s Opp'n to Defs.' Mot. (ECF No. 14) ("Opposition" or "Opp'n").) Defendants filed their Reply on April 22, 2024. (*See* Defs.' Reply in Supp. of Mot. (ECF No. 15) ("Reply").) Pursuant to Local Rule 230(g), the matter was submitted on the briefs without oral argument. (ECF No. 22).

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DISCUSSION

III. Legal Standard

The Federal Arbitration Act ("FAA") governs arbitration agreements. 9 U.S.C. § 2. The FAA affords parties the right to obtain an order directing that arbitration proceed in the manner provided for in the agreement. *Id.* § 4. To decide on a motion to compel arbitration, a court must determine: (1) whether a valid agreement to arbitrate exists and, if it does, (2) whether the agreement encompasses the dispute at issue. *Boardman v. Pac. Seafood Grp.*, 822 F.3d 1011, 1017 (9th Cir. 2016). Arbitration is a matter of contract, and the FAA requires courts to honor parties' expectations. *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 351 (2011) (citing *Rent-A-Ctr., W., Inc. v. Jackson*, 561 U.S. 63, 67–69 (2010)). However, parties may use general contract defenses to invalidate an agreement to arbitrate. *See id.* at 339. Thus, a court should order arbitration of a dispute only where satisfied that neither the agreement's formation nor its enforceability or applicability to the dispute is at issue. *See Granite Rock Co. v. Int'l Bhd. of Teamsters*, 561 U.S. 287, 299–300 (2010). "Where a party contests either or both matters, 'the court' must resolve the disagreement," *Granite Rock Co.*, 561 U.S. at 299, because "a party cannot be required to submit to arbitration any dispute which [it] has not agreed so to submit[,]" *Knutson v. Sirius XM Radio Inc.*, 771 F.3d 559, 565 (9th Cir. 2014) (quoting *United Steelworkers of Am. v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 582 (1960) (alteration omitted)). If a valid arbitration agreement encompassing the dispute exists, arbitration is mandatory. *See Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 218 (1985). Under § 3 of the FAA, a court, "upon being satisfied that the issue involved . . . is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement . . . ." 9 U.S.C. § 3.

The party seeking to compel arbitration bears the burden of proving by a preponderance of the evidence the existence of a valid agreement to arbitrate. *See*

Ashbey v. Archstone Prop. Mgmt., Inc., 785 F.3d 1320, 1323 (9th Cir. 2015). In resolving a motion to compel arbitration, "[t]he summary judgment standard [of Federal Rule of Civil Procedure 56] is appropriate because the district court's order compelling arbitration 'is in effect a summary disposition of the issue of whether or not there had been a meeting of the minds on the agreement to arbitrate.'" *Hansen v. LMB Mortg. Servs., Inc.*, 1 F.4th 667, 670 (9th Cir. 2021) (quoting *Par-Knit Mills, Inc. v. Stockbridge Fabrics Co.*, 636 F.2d 51, 54 n.9 (3d Cir. 1980)). Under this standard of review, "[t]he party opposing arbitration receives the benefit of any reasonable doubts and the court draws reasonable inferences in that party's favor, and only when no genuine disputes of material fact surround the arbitration agreement's existence and applicability may the court compel arbitration." *Smith v. H.F.D. No. 55, Inc.*, No. 2:15-cv-01293-KJM-KJN, 2016 WL 881134, at *4 (E.D. Cal. Mar. 8, 2016). A material fact is genuine if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 500 (9th Cir. 1992) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)). Conversely, "[w]here the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial.'" *Id.* (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986)).

IV. Analysis

A. DYCOM May Enforce the Arbitration Agreement

Plaintiff initially argues that Dycom cannot enforce the arbitration agreement for two reasons. (*See* Opp'n at 4–7.) First, Plaintiff argues that Dycom cannot enforce the arbitration agreement because it is not a signatory to the agreement and its claims are not covered by the agreement. (*See id.* at 4–5.) Second, Plaintiff argues that Dycom is not a third-party beneficiary to the arbitration agreement. (*See id.* at 6–7.) Because the Court agrees that Dycom is a third-party beneficiary of the arbitration agreement, the Court concludes that Dycom may enforce the agreement and does not address Plaintiff's first argument.

1. Legal Standard

State law determines whether a non-signatory to an agreement containing an arbitration clause may compel arbitration. *Ngo v. BMW of N. Am., LLC*, 23 F.4th 942, 946 (9th Cir. 2022) (citing *Arthur Andersen LLP v. Carlisle*, 556 U.S. 624, 631–32 (2009)). Under California law, a non-signatory is a third-party beneficiary only to a contract "made expressly for [its] benefit." *Id.* (quoting Cal. Civ. Code § 1559) (alteration in *Ngo*). Under California law, "[t]he mere fact that a contract results in benefits to a third party does not render that party a 'third party beneficiary'"; rather, the parties to the contract must have intended the third party to benefit. *Norcia v. Samsung Telecommunications Am., LLC*, 845 F.3d 1279, 1290 (9th Cir. 2017) (quoting *Matthau v. Superior Ct.*, 151 Cal. App. 4th 593, 602 (2007)). The test is this:

> Examine the express provisions of the contract at issue, as well as the relevant circumstances of the contract's formation, to determine not only (1) whether the third party would benefit from the contract, but also (2) whether a motivating purpose of the contracting parties was to provide a benefit to the third party; and (3) whether permitting a third party to bring its own breach of contract action against a contracting party would be consistent with the objectives of the contract and the reasonable expectations of the contracting parties. The proponent must satisfy all three elements for the third party action to proceed.

Hernandez v. Meridian Mgmt. Servs., LLC, 87 Cal. App. 5th 1214, 1222 (2023) (citing *Goonewardene v. ADP, LLC*, 6 Cal. 5th 817, 830 (2019)). *Accord Ngo*, 23 F.4th at 946.

2. Analysis

Plaintiff argues that "nothing in the Agreement indicates that it was intended to benefit Dycom." (Opp'n at 7.) Plaintiff argues that "if Utiliquest intended for Dycom to benefit from the Agreement, it would have presumably included Dycom, either by name or as 'parent company,' as one of the entities listed in the 'Company' definition." (*Id.*) Not so.

As Defendants point out, "[t]he Agreement expressly provides that it 'applies to any claims or disputes . . . that You may have against the Company, and/or *its parents*,

subsidiaries and affiliates . . . Each and all of the individuals and entities in the preceding clause may enforce this Agreement." (Reply at 5 (quoting Decl. of Lori Mullins in Supp. of Mot. Ex. G (ECF No. 9-3 at 23–26), at 1 ("Mullins Decl. Ex. G") (providing a copy of the arbitration agreement Plaintiff electronically signed) (first alteration added; emphasis and omissions added in the Reply).) "The test for determining whether a contract was made for the benefit of a third person is whether an intent to benefit a third person appears from the terms of the contract." *Balsam v. Tucows Inc.*, 627 F.3d 1158, 1162 (9th Cir. 2010) (quoting *Spinks v. Equity Residential Briarwood Apartments*, 171 Cal. App. 4th 1004, 1022 (2009)). "If the terms of the contract necessarily require the promisor to confer a benefit on a third person, then the contract, and hence the parties thereto, contemplate a benefit to the third person." *Spinks*, 171 Cal. App. 4th at 1022 (quoting *Johnson v. Holmes Tuttle Lincoln-Mercury, Inc.*, 160 Cal. App. 2d 290, 297 (1958)).

Here, the arbitration agreement explicitly states that the agreement extends to "any claims or disputes that . . . [Plaintiff] may have against [Utiliquest], and/or: its parents, subsidiaries and affiliates . . . ." (Mullins Decl. Ex. G, at 1.) Thus, unlike in other cases, the arbitration agreement clearly contemplates a benefit being conferred to Utiliquest's parents, which would include Dycom, and that Dycom would receive the benefit of being able to enforce the arbitration agreement. *Compare with Ford Motor Warranty Cases*, 89 Cal. App. 5th 1324, 1338 (2023) (holding that the defendant was not a third-party beneficiary because the agreement's "direct benefits are expressly limited to those persons who might rely on it to avoid proceeding in court — the purchaser, the dealer, and the dealer's employees, agents, successors or assigns."); *Ngo*, 23 F.4th at 948 ("Though the language allows for arbitration of certain claims concerning third parties, it still gives only NGO, the dealership, and the assignee the power to compel arbitration."). Thus, here, Dycom demonstrates that it "'is a member of a class of persons for whose benefit [the agreement] was made.'" *Spinks*, 171 Cal. App. 4th at 1023 (quoting *Garratt v. Baker*, 5 Cal. 2d 745, 748 (1936)).

Relatedly, because Dycom can show that it is a member of a class for whose benefit the agreement was made, Dycom can also demonstrate that permitting it to bring its own breach of contract action against Plaintiff would be consistent with the objectives of the contract and the reasonable expectations of the contracting parties. *See Hernandez*, 87 Cal. App. 5th at 1222 (citing *Goonewardene*, 6 Cal. 5th at 830). Plaintiff cites to *Fuentes v. TMCSF, Inc.*, 26 Cal. App. 5th 541 (2018), but that case undermines Plaintiff's position. (*See* Opp'n at 7.) In *Fuentes*, the court held that the defendant could not enforce the arbitration agreement as a third-party beneficiary because the arbitration clause "had its own list of intended third party beneficiaries" and "Riverside was not among them." *Fuentes*, 26 Cal. App. 5th at 552. Specifically, the "arbitration clause itself specified the entities to which it applied", limiting the clause to "'any of ESB's successors, assigns, parents, subsidiaries, or affiliates and/or any employees, officers, directors, agents, of the aforementioned . . . .'" *Id.* at 549. Similar language is used here (*compare with* Mullins Decl. Ex. G, at 1), but, unlike in *Fuentes*, Dycom falls within the scope of the arbitration clause's limited clause as a parent of Utiliquest, *see Fuentes*, 26 Cal. App. 5th at 552. (*See also* Decl. of Sara B. Tosdal in Supp. of Pl.'s Opp'n Ex. C (ECF No. 14-2 at 11–12) (providing a copy of an announcement posted on Dycom's website announcing that Utiliquest has become a "wholly owned subsidiary of Dycom.").) Therefore, it would be consistent with the terms of the arbitration agreement and thus the reasonable expectations of the contracting parties for a parent of Utiliquest, like Dycom, to enforce the arbitration clause. *See Hernandez*, 87 Cal. App. 5th at 1222 (citing *Goonewardene*, 6 Cal. 5th at 830).

As a result, the Court concludes that Utiliquest is a third-party beneficiary of the arbitration agreement between Utiliquest's parent company Dycom and Plaintiff, and that Utiliquest may therefore compel arbitration. *See Ngo*, 23 F.4th at 946–48.

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B. The Arbitration Agreement Is Not Unconscionable

Plaintiff argues that "[e]ven if the Court finds that the Agreement covers the claims and parties at issue in this case, Defendants' motion fails because the Agreement is clearly unconscionable, both procedurally and substantively, and is therefore unenforceable." (Opp'n at 8.) The Court disagrees. As explained below, while there is a minimal amount of procedural unconscionability and somewhat more substantive unconscionability, it is not enough to make the entire arbitration agreement unconscionable and unenforceable.[1]

1. Legal Standard

Under California law, a court may refuse to enforce a provision of a contract if it determines that the provision was "unconscionable at the time it was made." *Lim v. TForce Logistics, LLC*, 8 F.4th 992, 1000 (9th Cir. 2021) (quoting Cal. Civ. Code § 1670.5(a)). Unconscionability "is concerned not with a simple old-fashioned bad bargain, but with terms that are unreasonably favorable to the more powerful party." *Bielski v. Coinbase, Inc.*, 87 F.4th 1003, 1013 (9th Cir. 2023) (quoting *Sanchez v. Valencia Holding Co., LLC*, 61 Cal. 4th 899, 911 (2015)). A contract is unconscionable if one of the parties lacked a meaningful choice in deciding whether to agree and the contract contains terms that are unreasonably favorable to the other party. *OTO, L.L.C. v. Kho*, 8 Cal. 5th 111, 125 (2019) (citing *Sonic-Calabasas A, Inc. v. Moreno*, 57 Cal. 4th 1109, 1133 (2013) ("*Sonic II*")). "As that formulation implicitly recognizes, the doctrine of unconscionability has both a procedural and a substantive element, the former focusing on oppression or surprise due to unequal bargaining power, the latter on overly harsh or one-sided results." *Baltazar v. Forever 21, Inc.*, 62 Cal. 4th 1237, 1243 (2016) (quoting *Sonic II*, 57 Cal. 4th at 1133). But "[s]ubstantive and

[1] Defendants argued for the first time in the Reply that the Court must compel arbitration because of a delegation clause contained within the agreement that Plaintiff did not challenge specifically. (*See* Reply at 2–4.) The Court declines to consider this belated argument. *See, e.g.*, *Zamani v. Carnes*, 491 F.3d 990, 997 (9th Cir. 2007) ("The district court need not consider arguments raised for the first time in a reply brief." (citing *Koerner v. Grigas*, 328 F.3d 1039, 1048 (9th Cir. 2003). *Accord Mitchell v. United States*, 971 F.3d 1081, 1084 n.4 (9th Cir. 2020).

procedural unconscionability 'need not be present in the same degree.'" *Patrick v. Running Warehouse, LLC*, 93 F.4th 468, 479 (9th Cir. 2024) (quoting *Sanchez*, 61 Cal. 4th at 910). "Essentially a sliding scale is invoked . . . [so] the more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to come to the conclusion that the term is unenforceable, and vice versa." *Sanchez*, 61 Cal. 4th at 910 (quoting *Armendariz v. Found. Health Psychcare Servs., Inc.*, 24 Cal. 4th 83, 114 (2000)).

2. Analysis

a. There Is Minimal Procedural Unconscionability

i. Legal Standard

A procedural unconscionability analysis "begins with an inquiry into whether the contract is one of adhesion." *OTO, L.L.C.*, 8 Cal. 5th at 126 (quoting *Armendariz*, 24 Cal. 4th at 113). An adhesive contract is standardized, generally on a preprinted form, and offered by the party with superior bargaining power "on a take-it-or-leave-it-basis." *Id.* (quoting *Baltazar*, 62 Cal. 4th at 1246). "Arbitration contracts imposed as a condition of employment are typically adhesive," so "[t]he pertinent question, then, is whether circumstances of the contract's formation created such oppression or surprise that closer scrutiny of its overall fairness is required." *Id.*

"The oppression that creates procedural unconscionability arises from an inequality of bargaining power that results in no real negotiation and an absence of meaningful choice." *Poublon v. C.H. Robinson Co.*, 846 F.3d 1251, 1260 (9th Cir. 2017) (quoting *Grand Prospect Partners, L.P. v. Ross Dress for Less, Inc.*, 232 Cal. App. 4th 1332, 1347–48 (2015), *as modified on denial of reh'g* (Feb. 9, 2015)). "The circumstances relevant to establishing oppression include, but are not limited to[:]"

> (1) the amount of time the party is given to consider the proposed contract; (2) the amount and type of pressure exerted on the party to sign the proposed contract; (3) the length of the proposed contract and the length and complexity of the challenged provision; (4) the education and experience of the party; and (5) whether the party's review of the proposed contract was aided by an attorney.

OTO, L.L.C., 8 Cal. 5th at 126–27 (quoting *Grand Prospect Partners*, 232 Cal. App. 4th at 1348).

Procedural surprise focuses on whether the challenged term is hidden in a prolix printed form or is otherwise beyond the reasonable expectation of the weaker party. *Morris v. Redwood Empire Bancorp*, 128 Cal. App. 4th 1305, 1321 (2005) (citations omitted). *Accord Bielski*, 87 F.4th at 1013. However, California courts have recognized that "the adhesive nature of a contract, without more, would give rise to a low degree of procedural unconscionability at most." *Poublon*, 846 F.3d at 1261–62 (citing *Baltazar*, 62 Cal. 4th at 1245). Thus, to find that there was procedural unconscionability, the Court must find that there was "'surprise or other sharp practices' [which] may arise when a party with less bargaining power is not told about an unusual provision, or the party is otherwise 'lied to, placed under duress, or otherwise manipulated into signing the arbitration agreement.'" *Id.* at 1261 n.2 (quoting *Baltazar*, 62 Cal. 4th at 1245).

ii. Analysis

(A) The Adhesive Nature of the Arbitration Agreement Creates Some Procedural Unconscionability

As an initial matter, there is no doubt that the arbitration agreement between Plaintiff and Defendants was part of an adhesive contract provided "on a take-it-or-leave-it-basis." *OTO, L.L.C.*, 8 Cal. 5th at 126 (quoting *Baltazar*, 62 Cal. 4th at 1246). Indeed, the Declaration of Lori Mullins admits that new hires were given a copy of the arbitration agreement and were "required to review and execute each of the documents linked in the portal[,]" including the arbitration agreement, before they could work. (Mullins Decl. (ECF No. 9-3 at 1–6) ¶ 14; *see also id.* ¶¶ 6–9.) Thus, "the adhesive nature of the contract is sufficient to establish some degree of procedural unconscionability." *Sanchez*, 61 Cal. 4th at 915. However, "the adhesive nature of a contract, without more, would give rise to a low degree of procedural unconscionability at most[,]" so the Court "turn[s] to the question whether there are

other indications of oppression or surprise that would lead California courts to conclude that the degree of procedural unconscionability is high." *Poublon*, 846 F.3d at 1261–62 (citing *Baltazar*, 62 Cal. 4th at 1245).

(B) There Was No Significant Oppression

First, Plaintiff argues that there was a high level of oppression because he "was unable to thoroughly review the Agreement and understand what he was consenting to, particularly in light of his lack of education." (Opp'n at 11 (citing *Swain v. LaserAway Med. Grp., Inc.*, 57 Cal. App. 5th 59, 69 (2020), *as modified* (Nov. 3, 2020)).) However, courts have found procedural unconscionability based on specific factors in the employee's education or background, such as where the employee could not speak English, not where they did not have a college degree. *See, e.g.*, *Subcontracting Concepts (CT), LLC v. De Melo*, 34 Cal. App. 5th 201, 210–11 (2019) (noting that the employee had limited English skills); *Carmona v. Lincoln Millennium Car Wash, Inc.*, 226 Cal. App. 4th 74, 85 (2014) (noting that the employer knew that the employees could not read English and did not provide a Spanish translation of the enforceability clause despite making translations of other material). *Accord OTO, L.L.C.*, 8 Cal. 5th at 128 and n.8.

Moreover, Plaintiff complains that he had little time to review and sign the arbitration agreement, but he received more time than the plaintiff in *Swain*, the case he cites. (*See* Opp'n at 10.) In *Swain*, "Laseraway provided the agreement to Swain to sign 'immediately' before she was 'taken to [a] room for her procedure,' demonstrating that Laseraway gave Swain little time to review, and exerted pressure on her to sign, the agreement." *Swain*, 57 Cal. App. 5th at 69. Here, although Plaintiff was told to sign the agreement "as soon as possible[,]" Plaintiff was not waiting on a service and still had at least 24 hours to review the paperwork according to Plaintiff's Opposition. (*See* Opp'n at 10 (citing Decl. of Pl. Robert Hicks in Supp. of Pl.'s Opp'n (ECF No. 14-1 at 1–4) ¶ 12 ("Hicks Decl.")).) Thus, Plaintiff received significantly more time to review the arbitration agreement than the plaintiff in *Swain*, yet even in *Swain*

the court simply determined that "the arbitration agreement would still have at least a *minimal degree* of procedural unconscionability." *Id.* at 71 (emphasis added).

Indeed, Plaintiff admits that he was "emailed a job offer at Utiliquest" that "included a preview of forms [he] would be required to sign, including the Agreement." (Hicks Decl. ¶ 8.) Plaintiff admits that he reviewed the arbitration agreement on June 6, 2022, which was three days *before* he signed and reviewed the arbitration agreement being enforced against him now on June 9, 2022. (*Compare* ECF No. 14-1 at 6, 9, 13 (providing a copy of a contract Plaintiff electronically signed on 6/6/2022); ECF No. 9-3 at 18–19 (same) *with* ECF No. 9-3 at 26 (providing a copy of a contract Plaintiff electronically signed on 6/9/2022); ECF No. 14-2 at 7 (same).) As a result, Plaintiff's complaints regarding a lack of time to review the arbitration agreement ring hollow.

Second, Plaintiff argues that there was a high amount of procedural unconscionability because the arbitration agreement contained legal jargon and he did not understand the agreement until he retained counsel. (*See* Opp'n at 11.) However, that was not enough in *Sanchez* to add to the procedural unconscionability analysis where the employer even admitted during oral arguments that "[m]any people who are not legally trained do not understand the vast majority of what is in this contract[.]" *Sanchez*, 61 Cal. 4th at 914 (first alteration included; second alteration added).

Accordingly, Plaintiff has failed to establish that there was any additional oppression when formulating the arbitration agreement separate from the oppression inherent in an adhesive contract. *See Poublon*, 846 F.3d at 1261–62.

(C) There Was No Significant Suprise

Without oppression, Plaintiff is left with surprise but here too his arguments fail. (*See* Opp'n at 11–13.) First, Plaintiff argues that the arbitration agreement was a surprise to him because "it includes over 300 single spaced lines of legal jargon, incomprehensible to a layperson." (*Id.* at 11.) In reality, the arbitration agreement is a

three-page document with two columns of block text. (*See* Mullins Decl. Ex. G, at 1–3.) Arbitration agreements of the same or similar length and stylized with like features such as columns and bolded headings have been approved before. *See, e.g.*, *Davis v. Kozak*, 53 Cal. App. 5th 897, 907 (2020) ("The agreement is set forth in a standalone three-page document, clearly labeled 'Binding Arbitration Agreement,' with standard-sized and readable text."); *Cohen v. CBR Sys., Inc.*, 625 F. Supp. 3d 997, 1003 (N.D. Cal. 2022) ("The Koneru Contract is only four pages long with the arbitration clause on the first page, and the Second Cohen and Vaccarella Contracts are eleven pages long with the arbitration provision on page 4 under the bolded section heading 'Governing Law.'"). Thus, the three-page arbitration agreement is not "visually impenetrable" and does not "challenge[ ] the limits of legibility." *OTO, L.L.C.*, 8 Cal. 5th at 128.

Second, Plaintiff argues that there was a high amount of surprise and procedural unconscionability "because [the agreement] was one document of several that Plaintiff had to sign to commence his work at Utiliquest." (Opp'n at 12 (citing *Dougherty v. Roseville Heritage Partners*, 47 Cal. App. 5th 93, 103 (2020)).) However, Plaintiff was not pressured into signing the agreement, unlike the plaintiff in *Dougherty*. In that case, the plaintiff was looking for long-term residential care for her father who suffered from dementia (also known as a nursing home or a skilled nursing facility). The defendant's business "was 'the only feasible care option' for her father[,]" such that "Dougherty was 'relieved' to have found a placement for her father[,]" and "was 'crying' and 'emotionally exhausted' as she signed the admission forms." *Dougherty*, 47 Cal. App. 5th at 97–98. Moreover, although Plaintiff avers that he had to read more than 90 pages of documents while on-boarding (*see* Hicks Decl. ¶ 11), Plaintiff does not aver or allege that the agreement was hidden like a needle in a haystack, unlike in *Dougherty* where the arbitration agreement was "buried within the packet at pages 43 through 45 [of 90]." *Dougherty*, 47 Cal. App. 5th at 104. Rather, the arbitration agreement "was not hidden, but prominently featured as part of the employment application . . . ." *Sanchez v. Carmax Auto Superstores California, LLC*,

224 Cal. App. 4th 398, 403 (2014) ("*Carmax*"). And as mentioned before, Plaintiff previewed and signed the arbitration agreement on June 6, 2022, three days before he signed the operative agreement being enforced against him in this case.

Finally, Plaintiff argues that there was a high degree of surprise because he was forced to complete the on-boarding process online and Defendants never inquired into whether Plaintiff "could view the documents electronically[ ] and did not provide any alternative options for Plaintiff to sign the Agreement." (Opp'n at 12.) Here, Plaintiff relies on *Hasty v. American Automobile Association*, 98 Cal. App. 5th 1041, 1057–58 (2023), *review denied* (May 1, 2024). (*See* Opp'n at 12–13.) Admittedly, *Hasty* has some superficial similarities, but it is ultimately distinguishable.

For instance, Plaintiff, like Hasty, claims that he does not own a computer or printer. *Compare* (Hicks Decl. ¶ 7) *with Hasty*, 98 Cal. App. 5th at 1057. And Defendants, like the defendants in *Hasty*, allegedly did not "inquire[ ] into whether [Plaintiff] had the ability to view the documents electronically and did not appear to provide any other alternative, such as to view the documents at an office on a computer or to pick up the physical documents for review before signature." *Hasty*, 98 Cal. App 5th at 1057. (*See* Opp'n at 12–13.) However, here Plaintiff had already applied online to an internet job posting for the position through the website Indeed. Given his use of the internet to apply for the position, it would have been clear to Defendants that Plaintiff had access to a computer and the internet, that he could view the documents electronically, and that he had sufficient skill to complete a job application online. (*See* Hicks Decl. ¶ 5.) Thus, Plaintiff's first complaint about Defendants never inquiring into whether he could view the documents electronically fails because there was no need to considering that Plaintiff reached out to Defendants through electronic means. (*See* Opp'n at 12.)

Similarly, Plaintiff complains that Defendants never offered any other options for Plaintiff to view and sign the arbitration agreement (*see* Opp'n at 12), but Plaintiff admits that he previewed and signed the arbitration agreement on June 6, 2022

before he signed the operative agreement on June 9, 2022 (*see* Hicks Decl. ¶¶ 8–12). Thus, there was no need to provide an alternative method when Plaintiff already had a chance to preview the contract and did review the arbitration agreement before he signed it (again) on June 9, 2022.

As a result, Plaintiff "has not established any other element of oppression or surprise associated with the [arbitration] agreement[.]" *Poublon*, 846 F.3d at 1263. "[T]herefore under California law, 'the degree of procedural unconscionability of [such] an adhesion agreement is low, and the agreement will be enforceable unless the degree of substantive unconscionability is high.'" *Id.* (quoting *Serpa v. California Sur. Investigations, Inc.*, 215 Cal. App. 4th 695, 704 (2013), *as modified* (Apr. 19, 2013), *as modified* (Apr. 26, 2013)).

b. There Are No Substantively Unconscionable Terms

i. Legal Standard

Substantive unconscionability pertains to the fairness of an agreement's actual terms and to assessments of whether they are overly harsh or one-sided. *OTO, L.L.C.*, 8 Cal. 5th at 125 (quoting *Pinnacle Museum Tower Ass'n v. Pinnacle Mkt. Dev. (US), LLC*, 55 Cal. 4th 223, 246 (2012)). This analysis "ensures that contracts, particularly contracts of adhesion, do not impose terms that have been variously described as 'overly harsh[,]' 'unduly oppressive[,]' 'so one-sided as to "shock the conscience[,]"' or 'unfairly one-sided[.]'" *Id.* at 129–30 (citations and some internal quotation marks omitted). Unconscionable terms "'impair the integrity of the bargaining process or otherwise contravene the public interest or public policy'" or attempt to impermissibly alter fundamental legal duties. *Id.* at 130 (quoting *Sonic II*, 57 Cal. 4th at 1145). This may include, as "illustrative, not exhaustive[,]" examples, "fine-print terms, unreasonably or unexpectedly harsh terms regarding price or other central aspects of the transaction, and terms that undermine the nondrafting party's reasonable expectations." *Id.* However, "[s]ubstantive terms that, in the abstract, might not

support an unconscionability finding take on greater weight when imposed by a procedure that is demonstrably oppressive." *Id.*

ii. Analysis

Plaintiff has only two challenges regarding the substantive unconscionability of the arbitration agreement, arguing that it does not provide sufficient discovery and that the arbitration agreement lacks mutuality. (*See* Opp'n at 14–19.) The Court disagrees.

(A) The Discovery Limitation Is Not Substantively Unconscionable

Plaintiff argues that the arbitration agreement is unconscionable because "[t]he default discovery provisions . . . only allow for the deposition of 'two individual fact witnesses and any expert designated by another party,' and only permit the parties to propound requests for documents, not requests for interrogatories or admissions." (Opp'n at 17 (citing Mullins Decl. ¶ 22; Mullins Decl. Ex. G, at 3).) Here, Plaintiff largely relies on *Fitz v. NCR Corporation*, 118 Cal. App. 4th 702 (2004) to argue that these initial limitations are too restrictive when combined with the fact that "[t]he Agreement further restricts additional discovery by requiring a stipulation by both parties for more[,]" and by giving the arbitrator the "exclusive authority to grant or deny such requests, based on the arbitrator's determination whether additional discovery is warranted by the circumstances of a particular case[.]" (*Id.* (first citing Mulls Decl. Ex. G, at 3; and then quoting Mullins Decl. Ex. G, at 3).)

In *Fitz*, the agreement "limit[ed] discovery to the sworn deposition statements of two individuals and any expert witnesses expected to testify at the arbitration hearing[,]" and it "require[d] all exhibits and a list of potential witnesses to be exchanged at least two weeks in advance of the arbitration hearing." *Fitz*, 118 Cal. App. 4th at 716. However, no other discovery was allowed unless the arbitrator found a compelling need to allow it, which, as specified in the arbitration agreement, required that it would be impossible to conduct a fair hearing without the additional

discovery. *See id.* The plaintiff in *Fitz* argued that these limitations were too restrictive for her to vindicate her rights in arbitration because she needed to depose an estimated 8 to 10 witnesses and needed to get the arbitrator's approval to access any written information. *See id.* at 717. The court agreed, noting that the agreement chose to limit the incorporated rules to the defendant's advantage. *See id.* at 718.

Here, as an initial matter, Plaintiff fails to argue that the arbitration agreement provides him insufficient discovery, which is sufficient to deny finding that the discovery limitation is substantively unconscionable. *See Mercuro v. Superior Ct.*, 96 Cal. App. 4th 167, 183 (2002) ("[W]ithout evidence showing how these provisions are applied in practice, we are not prepared to say they would necessarily prevent [the plaintiff] from vindicating his statutory rights.'"); *Poublon*, 846 F.3d at 1266 ("Finally, Poublon fails to make any showing that she would be unable to vindicate her rights under the standard provided in the agreement." (citing *Carmax*, 224 Cal. App. 4th at 405–06)). *Accord Davis*, 53 Cal. App. 5th at 912 ("*Mercuro* and *Poublon* emphasized that the plaintiffs before them had made no showing whatsoever of an inability to vindicate their statutory rights under the discovery standards provided in the subject arbitration agreements.").

Even when evaluating the substance of the limitation, however, Plaintiff can obtain more discovery here than in other cases. As in *Poublon*, "the discovery limitations and evidence presented are more similar to those in [*Carmax*] than those in *Fitz*." *Poublon*, 846 F.3d at 1271. Plaintiff has a lower standard to obtain discovery than in *Fitz*, which required that the discovery request be denied unless "*a fair hearing is impossible without additional discovery*." *Fitz*, 118 Cal. App. 4th at 709. Here, by contrast, Defendants concede that if they and Plaintiff are unable to stipulate to more discovery, "then the arbitrator can grant more if it is 'warranted by the circumstances of the particular case.'" (Reply at 13 (quoting Mullins Decl. Ex. G, at 3).) This standard appears to be more akin to the "showing of need" standard upheld in *Dotson v. Amgen, Inc.*, 181 Cal. App. 4th 975, 978, 983–84 (2010), and that discovery limitation

appeared more onerous than here where each party only had "the right to take the deposition of one individual and any expert witness designated by the other party[,]" and similarly had "the right to make requests for production of documents to any party." This "warranted by the circumstances" standard appears even less burdensome than the "substantial need" standard upheld in *Carmax* and is at least as liberal as the "good cause" standard upheld in *Poublon*. *See Poublon*, 846 F.3d at 1271 ("The California Court of Appeal rejected this argument, noting that in the dispute resolution provision at issue in its case, the discovery provisions were "considerably more liberal" than they were in *Fitz*, and the employee could get additional discovery merely by showing substantial need, rather than compelling need as in *Fitz*." (citing *Carmax*, 224 Cal. App. 4th at 405)).

Plaintiff counters, arguing that "granting the arbitrator discretion to expand discovery based on the arbitrator's assessment of the 'circumstances of the case' places a higher burden than 'simple showing of need' and is sufficiently vague as to diminish the arbitrator's authority to increase discovery." (Opp'n at 19 (citing *Baxter v. Genworth N. Am. Corp.*, 16 Cal. App. 5th 713, 928–29 (2017)).) However, "Baxter set forth facts tending to show that the default levels of discovery would be inadequate to vindicate her statutory rights." 16 Cal. App. 5th at 729 (distinguishing *Carmax,* 224 Cal. App. 4th 404–05; *Mercuro*, 96 Cal. App. 4th at 183). Moreover, unlike in *Baxter*, here there is only one standard based on the circumstances of the case, not two standards – that the requested discovery be needed for both good cause and sufficient cause. *Compare with Baxter*, 16 Cal. App. 5th at 729 ("In applying the Resolve guidelines and assessing whether a "sufficient" showing has been made to justify additional discovery, an arbitrator might expect a showing beyond simple "good cause," particularly if the employee seeks discovery well beyond the default limitations.").

Granted, Plaintiff does not have the advantage of substantial initial disclosures and obligations to supplement those initial disclosures. *Compare with Carmax*, 224

Cal. App. 4th at 404; *CarMax Auto Superstores California LLC v. Hernandez*, 94 F. Supp. 3d 1078, 1123–24 (C.D. Cal. 2015) (collecting cases). However, Defendants concede that "parties can avail themselves of *unlimited* subpoenas to third parties to produce documents and/or testify at deposition or at the hearing." (Reply at 12 (citing Mullins Decl. Ex. G, at 3).) Indeed, each party "may also propound requests [for] production of documents . . . ." (Mullins Decl. Ex. G, at 3.) Thus, Plaintiff has the ability to obtain all relevant documents, which was crucial in other cases where a discovery limitation was held substantively unconscionable. *See, e.g.*, *De Leon v. Pinnacle Prop. Mgmt. Servs., LLC*, 72 Cal. App. 5th 476, 487–89 (2021) (complaining that "the [agreement] does not provide for any similar document discovery").

As a result, because Plaintiff has failed to argue that the discovery limitations in this case prevent him from vindicating his rights during arbitration and because Plaintiff can obtain more discovery than in other cases, the Court concludes that the discovery limitation clause is not substantively unconscionable.

(B) The Agreement Is Mutual and Bilateral

Plaintiff also argues that the arbitration agreement is substantively unconscionable for a lack of mutuality because Plaintiff must arbitrate all his claims while Defendants may seek injunctive relief in courts for breaches of the separate confidentiality agreement that Plaintiff signed while on-boarding on his first day of work. (*See* Opp'n at 14–17 (relying on *Alberto v. Cambrian Homecare*, 91 Cal. App. 5th 482, 491–92 (2023)); *also* Tosdal Decl. Ex. B (ECF No. 14-2 at 8–10) (providing a copy of the signed confidentiality agreement).) However, as recognized in *Alberto*, "provisions that allow employers to seek a preliminary injunction outside of arbitration for breach of a confidentiality agreement are not, by themselves, unconscionable, simply because they primarily benefit employers." *Alberto*, 91 Cal. App. 5th at 492 (citing *Lange v. Monster Energy Co.*, 46 Cal. App. 5th 436, 450 (2020); *Carbajal v. CWPSC, Inc.*, 245 Cal. App. 4th 227, 250 (2016)). But additional provisions that waive the employer's need to obtain a bond before seeking an injunction, waive the

employer's need to obtain a bond before seeking an injunction, waive the employer's need to show irreparable harm, and require an employee to consent to an immediate injunction *are* unconscionable. *Id.* They exceed the legitimate "margin of safety" for the employer and are not mutual. *Id.* (citing *Lange*, 46 Cal. App. 5th at 451; *Carbajal*, 245 Cal. App. 4th at 250). But unlike in *Alberto*, *none* of those provisions are present here. *Compare with id.* at 493 ("Each of those provisions was present here . . . ."). (*See* Reply at 10 n.3.[2])

Accordingly, because the Court concludes that there are no substantively unconscionable terms, Plaintiff fails to establish that both elements of procedural and substantive unconscionability are present to establish that the arbitration agreement is unconscionable overall. *See OTO, L.L.C.*, 8 Cal. 5th at 125 (quoting *Armendariz*, 24 Cal. 4th at 114).

C. The Class Action Claims Are Waived and Dismissed

As Defendants note, the arbitration agreement "contains a waiver of the right to bring or participate in a class action suit or class arbitration." (Mot. at 6 (citing Mullins Decl. Ex. G, at 3).) And as Defendants also note, "[u]nder Supreme Court and Ninth Circuit precedent, such clauses must be enforced." (*Id.* (citing *Epic Sys. Corp. v. Lewis*, 584 U.S. 497, 524–25 (2018); *Armstrong v. Michaels Stores, Inc.*, 59 F.4th 1011, 1013 (9th Cir. 2023); *O'Connor v. Uber Techs., Inc.*, 904 F.3d 1087, 1094 (9th Cir. 2018)).) Thus, because Plaintiff assented to the arbitration agreement, which is valid, the Court must also enforce the valid class or collective action waiver, and, therefore, dismiss the class action claims from the Complaint. *See, e.g.*, *Prostek v. Lincare Inc.*, 662 F. Supp. 3d 1100, 1122 (E.D. Cal. 2023) (collecting cases).

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[2] Contrary to Defendants' contention, the arbitration agreement *does* state that both parties "may apply to a court of competent jurisdiction for temporary or preliminary injunctive relief in connection with an arbitrable controversy, including without limitation any controversy under any applicable restrictive covenant(s) or *confidentiality obligations* between [Plaintiff] and [Defendants]." (Mullins Decl. Ex. G, at 2 (emphasis added).) (*See* Reply at 10–11.)

D. The Individual PAGA Action Must Be Arbitrated

The arbitration agreement also contained a requirement that any individual PAGA claims be arbitrated. (*See* Mullins Decl. Ex. G, at 2 (stating that the agreement does not cover "representative actions for civil penalties filed under [PAGA] (but to the extent permitted by applicable law, any claim by You on Your own behalf under PAGA to recover Your unpaid wages must be arbitrated and is covered by this Agreement.").) Both the United States and California Supreme Courts have recognized that individual PAGA claims may be arbitrated even though waivers of representative PAGA claims are unenforceable. *See, e.g.*, *Viking River Cruises, Inc. v. Moriana*, 596 U.S. 639, 662 ("Based on this clause, Viking was entitled to enforce the agreement insofar as it mandated arbitration of Moriana's individual PAGA claim."), *reh'g denied*, 143 S. Ct. 60 (2022), *not followed on state law grounds by Adolph v. Uber Techs., Inc.*, 14 Cal. 5th 1104 (2023). Thus, the Court concludes that Plaintiff's individual PAGA claim must be arbitrated.

E. The Representative PAGA Claim Is Stayed

Where a plaintiff has brought a PAGA action comprising individual and non-individual claims, an order compelling arbitration of the individual claims does not strip the plaintiff of standing to sue as an aggrieved employee to litigate claims on behalf of other employees under PAGA. *Adolph*, 14 Cal. 5th at 1114. As a result, the Court must decide how to handle the remaining representative PAGA claim. Defendants ask that the representative claim be stayed but Plaintiff asks that the claim proceed. (*Compare* Opp'n at 21–22 *with* Mot. at 10; Reply at 14–15.)

However, as Defendants note, both California and federal arbitration law require that any remaining claims be stayed pending completion of arbitration of the other claims. (*See* Reply at 15 (citing 9 U.S.C. § 3 (requiring the court, "on application of one of the parties [to] stay trial of the action until such arbitration has been had in accordance with the terms of the agreement . . . ."); Cal. Code Civ. Proc. § 1281.4 (requiring the court "upon motion of a party to such action or proceeding, [to] stay the

action or proceeding until an arbitration is had in accordance with the order to arbitrate or until such earlier time as the court specifies.")).) Plaintiff does not dispute this, but, instead, argues that the Court has discretion to stay, which means discretion to permit the case to proceed. (*See* Opp'n at 21.) Here, Plaintiff mostly relies on *Jarboe v. Hanlees Auto Group*, 53 Cal. App. 5th 539, 557 (2020) to argue that "[b]ecause a PAGA claim is representative and does not belong to an employee individually, an employer should not be able to dictate how and where the representative action proceeds." (Opp'n at 21 (quoting *Jarboe*, 53 Cal. App. 5th at 557).) But *Jarboe* was decided before *Adolph*, which held that staying rather than dismissing was the way to proceed, and in no instance was permitting the representative claim to proceed on its own contemplated. *See Adolph*, 14 Cal. 5th at 1124. And as other courts have subsequently recognized, *Jarboe* had the issue of individual PAGA claims brought against non-signatories to the arbitration agreement that were not compelled to arbitration, so those PAGA claims could not be stayed, "and since the PAGA claim against the signatory and non-signatory defendants was not severable, the PAGA claim could not be stayed." *Elvira v. So Cal Elite Traffic, Inc.*, No. CIVDS1935613, 2021 WL 9218377, at *4 (Cal. Super. Apr. 16, 2021). Here, "this problem does not exist." *Id.* "Accordingly, a stay of this [C]ourt's proceedings on Plaintiff's PAGA claims is appropriate." *Id. See, e.g.*, *Josephson v. Lamon Construction Co., Inc.*, No. 2:23-cv-000043-DAD-AC, 2024 WL 382378, at *4 (E.D. Cal. Jan. 31, 2024) (collecting cases where courts stayed the representative claims from proceeding). *But see Johnson v. Lowe's Home Centers, LLC*, 93 F.4th 459, 465–68 (9th Cir. 2024) (Lee, J., concurring) (expressing concern that current splitting of representative and individual claim may increase pressure on outcome for arbitration of low-value individual claim because of preclusive effect for the representative claim in federal court down the road, which may lead to "potential conflict [between California law and the FAA] in future cases.").

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CONCLUSION

For the reasons set forth above, the Court GRANTS Defendants' Motion to Compel Arbitration (ECF No. 9). As a result, the Court: (1) compels arbitration of Plaintiff's claims on an individual basis; (2) compels arbitration of Plaintiff's individual PAGA claim; (3) dismisses without prejudice Plaintiff's class action claims; and (4) stays litigation of Plaintiff's representative PAGA claim. The parties are instructed to file a joint status report with the Court every six months informing the Court of the status of arbitrating Plaintiff's claims, and the parties are to immediately notify the Court once arbitration of Plaintiff's claims has been completed.

IT IS SO ORDERED.

Dated: **June 10, 2024**

Hon. Daniel J. Calabretta
UNITED STATES DISTRICT JUDGE

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